114

(2)

No. 08-759

Supreme Court, U.S.
FILED
DEC 31 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,

Petitioner,

v.

SAN DIEGO COUNTY, CALIFORNIA, ET AL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC, IN SUPPORT OF NEITHER PARTY

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

December 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

City of Rancho Palo Verdes v. Abrams, 544 U.S. 113 (2005) 5

Puerto Rico Telephone Co. v. Municipality of Guayanilla, 450 F.3d 9 (1st Cir. 2006) 4

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004) 4

TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000) 3

TCG NY, Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002) 4

United States v. *Salerno*, 481 U.S. 739 (1987) 5

Pending Petitions

No. 08-108, *Flores-Figueroa v. United States* 4

No. 08-5316, *Mendoza-Gonzales v. United States* 4

Statutes

Telecommunications Act of 1996:

Section 253(a) 2, 3

Section 253(c) 1, 2, 4

Section 332(c)(7) 3

INTEREST OF *AMICUS CURIAE*

Amicus curiae Level 3 Communications, LLC, is the petitioner in a pending petition for certiorari (No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, Mo.*) discussed in the petition for certiorari in this case.

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC[1]

Amicus is the petitioner in No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, Mo.* (hereinafter, *Level 3*). *Amicus* agrees with the petitioner in this case that the decision of the Ninth Circuit (like the decision of the Eighth Circuit that it expressly adopts) directly implicated an important and recurring circuit conflict and seriously misreads the Telecommunications Act of 1996. Those decisions cannot be reconciled with the plain text of the statute or the pro-competitive purpose underlying its enactment. Nor, as petitioner Sprint explains (at 19-20), do those rulings draw any support from the

---

[1] Pursuant to Rule 37.2, all parties have consented to the filings of this brief, and letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

position of the Federal Communications Commission.[2]

Amicus nonetheless disagrees with the contentions of petitioner Sprint that its petition (hereinafter, *Sprint*) presents a better vehicle than *Level 3* to resolve the recurring conflicts in the circuits over the proper construction of Section 253 of the Telecommunications Act of 1996, or alternatively that the cases should both be granted and consolidated for briefing and argument. *See Sprint* Pet. at 26-28, For six reasons, it would be unwise for the Court to grant certiorari in this case rather than *Level 3*. Nor should the Court consolidate the two together.

---

[2] Indeed, in *Level 3*, respondent City of St. Louis acknowledges that the standard applied by the Ninth Circuit prior to its recent en banc ruling in *Sprint* – which broadly applied Section 253 to find preemption – "has been used by the FCC and other courts." *Level 3* BIO 26. St. Louis nonetheless argues that the FCC supports the City's position in light of "suggested guidelines" in which the FCC requests information on the "specific telecommunications service or services . . . the petitioner [is] prohibited or effectively prohibited from providing." *Id.* at 18 (quoting 13 F.C.C.R. 22970 (1998)). But that request for information is not equivalent to a legal standard for proving preemption. St. Louis also omits the FCC's caution that "not all questions will be relevant to all petitions" (13 F.C.C.R. 22971), as well as its directive that parties submit information on factors that the Eighth and Ninth Circuits would deem irrelevant, such as "whether price levels in the market preclude recovery of any such additional costs" and "cumulative adverse effects of requirements flowing from multiple local regulatory regimes" across the country (*id.* at 22972).

First, only *Level 3* presents the Court with the opportunity to resolve the conflict with the Sixth Circuit's holding in *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000), that Section 253(c) provides an independent basis for finding preemption under the Telecommunications Act, without regard to whether the challenged ordinance runs afoul of Section 253(a). The Eighth Circuit squarely acknowledged that conflict and, in response to Level 3's argument, passed upon the issue. No. 08-626 Pet. App. 28a.[3]

Second, and relatedly, the proper construction of Section 253(a) cannot be understood without reference to the exception provided by Section 253(c). *See Level 3* Pet. for Cert. 20-21; *Level 3* Cert. Reply 4-6. Thus, a significant argument of telecommunications providers in support of preemption under Section 253 is that the proper measure of whether a fee effectively prohibits a telecommunications service is whether it is "fair and reasonable" within the meaning of Section 253(c). Because Sprint has avowedly abandoned all reliance on Section 253(c) (*see Sprint* Pet. for Cert. 28 n.10), granting only its petition threatens to either distort or leave unresolved the preemptive effect of Section 253. In an analogous circumstance, the Court

---

[3] In its brief in opposition in *Level 3*, St. Louis asserts that the Eighth Circuit "did not interpret or apply Section 253(c)." *Level 3* BIO 12. In fact, as the City elsewhere recognizes, the court of appeals squarely "ruled that Section 253(c) does not independently limit local government action." *Id.* at 11 (citing Pet. App. 28a-29a). That ruling directly responded to petitioner's submissions. *See Level 3* Pet. App. 28a.

recently granted certiorari in No. 08-108, *Flores-Figueroa v. United States*. Although the Solicitor General had acquiesced to certiorari in an earlier-filed petition presenting the same question (No. 08-5316, *Mendoza-Gonzales v. United States*), the petitioner in *Flores-Figueroa* presented a more complete set of arguments in support of the defendants' construction of the statute at issue in that case. *See Flores-Figueroa* Cert. Reply 2-4.

Third, the *Level 3* petition more directly presents the circuit conflict over the proper construction of Section 253(a). The decisions of other circuits affording broad preemptive effect to Section 253 all involve local regulations governing telecommunications providers' access to public rights-of-way. *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *TCG NY, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002). That is the factual context in which the *Level 3* petition arises, and that petition accordingly presents the Court with the benefits that come from the percolation in the lower courts of the question of when such measures violate Section 253. The *Level 3* petition (at 32-33 & n.6) also collects the significant array of similar litigation that is pending in the lower courts.

Sprint, by contrast, involves the rules governing the siting of wireless telecommunications equipment, a distinct factual context that has not been the subject of conflicting appellate rulings or equivalent percolation. Importantly, *Sprint* does not present the recurring question, on which the courts of appeals are divided, of the scope of a local government's authority

to charge licensing fees for access to public rights-of-way.

Fourth, *Sprint* presents a potentially significant complication that could prevent this Court from resolving the proper construction of Section 253. A separate provision of the Telecommunications Act, Section 332(c)(7), directly governs "local zoning authority" over "[m]obile services" and provides that a local regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." The respondent county in *Sprint* contends that the case is properly resolved under Section 332(c)(7), not Section 253. Although there is certainly overlap between the provisions, the former is limited to competition in "personal wireless services." Section 332(c)(7) moreover contains no equivalent to Section 253(c)'s restriction of local regulation to "fair and reasonable compensation." Further, Section 332(c)(7) contains its own distinct set of procedural requirements. *See City of Rancho Palo Verdes v. Abrams*, 544 U.S. 113 (2005).

Fifth, *Sprint* also is an inappropriate vehicle in which to resolve the proper construction of Section 253 because the case was framed in the Ninth Circuit as a "facial challenge" to San Diego's regulatory scheme. As a consequence, *Sprint* presents the unusual overlay – raised in few if any other cases involving Section 253 – of the proper role of "the rule of *United States* v. *Salerno*, 481 U.S. 739 (1987), under which a claimant must show that 'no set of circumstances exists under which the [challenged statute] would be valid.'" *Sprint* Pet. for Cert. 11 (alteration in original). The respondent city in *Sprint* is thus sure to argue that the Court need not resolve

the proper construction of Section 253 in that case because its regulatory scheme can at the least be lawfully applied in appropriate circumstances.

Sixth, and more broadly, *Sprint* is a poor vehicle for resolving the scope of Section 253, because there is no record in that case of how the challenged wireless regulation functions in practice. Rather, Sprint challenged the regulation soon after it went into effect. *See Sprint* Pet. App. 4a. The petitioner in *Level 3*, by contrast, operated for several years under the St. Louis regulatory scheme.

The remaining question is whether certiorari should be granted in both *Level 3* and *Sprint* and the two consolidated for briefing and argument. As the example of the *Flores-Figueroa* and *Mendoza-Gonzales* petitions illustrates, *see supra* at 3-4, this Court's general practice is not to grant review in multiple cases presenting the same question. Sprint presents no substantial basis for departing from that practice here. If certiorari is granted in *Level 3*, Sprint no doubt will file an *amicus* brief on the merits, which could bring to the Court's attention any special considerations relating to wireless telecommunications services.

There would moreover be a material cost to adopting Sprint's proposal to hear the cases together. The parties in *Level 3* coordinated the briefing schedule in that case to present this Court with the opportunity, if it granted certiorari, to decide the case this Term. Level 3 thus filed its petition early and the City of St. Louis took only an abbreviated extension of time to respond. The case accordingly is scheduled to be consid red at the Court's Conference of January 16, 2009, which is likely to be the last

opportunity for cases to be set for argument this Term.

By contrast, in *Sprint*, the petitioner took all of its available time before filing its petition, and the respondent has taken a thirty-day extension of time to respond. As is illustrated by No. 08-645, *Abbott v. Abbot*, Sprint could have filed its petition as late as mid-November and still guaranteed that its case was available for Conference in mid-January. But it elected not to do so. *Sprint* accordingly will likely not be set for Conference until March 20, 2009. If the two petitions were granted on that date, the cases likely would not be argued until November 2009 and not decided until the Spring of 2010. Sprint's suggestion thus invites nearly a year of additional delay.

It would be inadvisable to so significantly defer resolving this important question. Both Level 3 and Sprint agree that the issue is of surpassing interest to the telecommunications industry. The current uncertainty over the scope of permissible local regulation "necessitates *immediate* intervention." *Sprint* Pet. for Cert. 23 (emphasis added). Local governments have a similarly significant interest in finally securing certainty regarding the scope of their regulatory authority. That is no doubt why St. Louis opposes Sprint's request as well. *See Level 3* BIO 37 n.23. Indeed, as the *Level 3* petition demonstrates (at 32 n.6), there is a wide array of litigation over the proper scope of Section 253 now pending in the district courts. The efficient disposition of those cases would be materially advanced by a prompt ruling by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari in No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, MO.* The Court should hold the petition in this case and dispose of it as appropriate in light of its decision in *Level 3.*

Respectfully submitted,

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

December 2008